IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 318 of 2004

Pandurang Undir Barashe .. Appellant

(Orig.plff)

V/s

1. Genmal T. Parmar @ Marwadi
2. Mangilal Tulshiram Parmar
3. Khmechand Manrupaji Parmar

since deceased through LRs

Smt.Radhabai Khemchand Parmar

4. Lalchand Manrupaji Parmar
5. Laxmichand Shankarlal Parmar

since deceased through LRs

5/1 Smt.Shantibai Laxmichand Parmar

5/2 Ratan Laxmichand Parmar

5/3 Ashok Laxmichand Parmar

5/4 Smt.Pushpa Laxmichand Parmar

5/5 Smt.Bebibai Laxmichand Parmar

5/6 Smt.Varsha Lamxichand Parmar ..Respondents

(Orig.defts)

Shri C.G.Gavnekar for Appellant

Shri P.S.Dani for Respondent nos.2 and 4.

CORAM:S.R.SATHE,J.

DATED:14th Feb. 2006

ORAL JUDGMENT :-

1. The Appellant original plaintiff in Special Civil suit No.8 of 1983 has preferred this appeal against the judgment and order passed by the 1st Ad Hoc Additional District Judge, Raigad-Alibag in Civil Appeal No.84 of 2000 whereby the order passed by the learned trial Judge declaring that the plaintiff is entitled to claim earnest money of Rs.500/- and interest of Rs.490/- from compensation awarded by the Land Acquisition Officer of the said lands was set aside and appeal was dismissed. For the sake of convenience hereafter the parties shall be referred to as the plaintiff and defendants.

2. Brief facts giving rise to this appeal are as under

. The suit lands described in detail in para 1 of the plaint were owned by one Tulsiram, deceased father of the defendant nos 1 and 2 and Motiram, deceased father of defendant nos.3 and 4. Deceased Tulsiram and deceased Motiram were real brothers. Defendant no.5 Laxmichand is the cousin of defendant nos.1 to 4. Deceased Tulshiram and Motiram executed an agreement to sell dated 17-4-1963 in favour of plaintiff and agreed to sell the suit land for Rs.5,000/- and accepted Rs.500/- as earnest money. On the date of said

agreement plaintiff was also put in possession of the suit lands. On 20-4-1964 the deceased Tulshiram and defendant no.3 Khemchand issued notice to the plaintiff and terminated an agreement to sell and asked plaintiff to hand over possession of the suit land. However, plaintiff did not comply the said notice hence Tulshiram and Khemchand issued second notice dated 19-1-1966 and again asked for ;possession. However, curiously enough, though the plaintiff had not returned the possession, deceased Tulshiram and Khemchand or their heirs did not take any further steps for acquiring possession from the plaintiff.

3. On 3-2-1970 the suit lands were acquired by the Land Acquisition officer and Notification to that effect was issued under Section 11 of the said Act. As plaintiff was in actual possession of the suit land he came to known that defendants are trying to secure compensation in respect of acquisition of the suit lands. He therefore approached the Land Acquisition office. However, he was informed that he may get his right determined in the civil court. Hence plaintiff filed present suit for a declaration that the defendants are not entitled to receive compensation amount out of acquisition proceedings of the suit land and on the contrary plaintiff is having right to receive the said compensation. He also prayed for permanent injunction restraining the defendants from receiving the

compensation amount. The plaintiff also averred in the plaint that as the defendants did not take any steps for getting possession after notice dated 19-1-1966 and plaintiff remained in possession of the said land continuously, he became owner of the said land by adverse possession.

4. The defendants filed their written statement at Exhs 24 and 25 and opposed the suit claim. They contended that the plaintiff failed to comply his part of the contract inasmuch as he did not pay consideration amount as agreed nor he filed any suit for specific performance.According to them plaintiffs had no right,title or interest in the suit property and as such he was not entitled to claim any compensation out of the land acquisition proceedings of the suit land.They also contended that plaintiff has not become the owner of the suit land by adverse possession as alleged by him. Hence on all these grounds the defendant no.1 prayed for dismissal of the suit.

5. On these pleadings the learned trial Judge framed issues on Exh.2. After considering the evidence adduced by both the parties, the learned trial Judge came to the conclusion that the plaintiff had received possession of the suit land under agreement to sell dated 17-4-1963. He did not pay further amount as contemplated and failed to prove that he was ready and wiling to perform his

part of the contract. The learned trial Court also came to the conclusion that the plaintiff has failed to prove that he has become owner of the suit land by virtue of adverse possession. The learned trial Court also held that plaintiff is not entitled to get compensation amount as alleged but he is certainly entitle for refund of earnest money and interest thereon. He therefore decreed the suit accordingly.

6. Being aggrieved by the said order the plaintiff filed Regular Civil Appeal NO.84 of 2000. After hearing argument of both the learned Advocates the first Appellate Court also came to the conclusion that the plaintiff had not become the owner by virtue of adverse possession nor he was entitled to get any compensation amount as he is not "person interested" as contemplated under Section 3(b) of the Land Acquisition Act, 1894 (hereinafter referred to as the said Act). He also held that the plaintiff is not even entitle to refund of earnest money out of compensation amount arising out of the land acquisition proceedings. He therefore partly allowed the appeal and set aside the declaration granted in favour of the plaintiff.

7. the above mentioned order is challenged by the plaintiff in this second Appeal. The appeal is heard finally at the admission stage.

8. In this appeal before me, Shri Gavnekar, learned Advocate for the plaintiff has urged only two points. Firstly, he submitted that both the Courts below have failed to consider that right to receive compensation for compulsory acquisition of land under the said Act is not restricted to those persons who have a legal or proprietary interest or estate in land and is available to all persons who have a right or claim to land, even if such right or claim does not amount to legal or proprietary estate or interest in the land. According to him the plaintiff being in possession of the suit land since 1963 till the acquisition of the land and actual delivery of possession is by him the plaintiff has a right to receive the compensation. As against this the defendants right if any has already been extinguished. Secondly, he canvased before me that the trial Court had in fact held that the plaintiff is entitled to claim amount of earnest money together with interest out of the said compensation proceedings but though there was no appeal filed by the defendants against the said order the first Appellate Court has set aside the said order in the appeal filed by the plaintiff and thereby committed an error of law. He, therefore, submitted that an appeal be allowed and the plaintiff's suit be decreed.

9. As against this Shri P.S.Dani,learned Advocate for the defendant has supported the judgment and order

passed by the first appellate Court.

10. It is not in dispute that deceased Tulshiram, defendant no.3 executed an agreement to sell in respect of the suit lands in favour of the plaintiff on 17-4-1963 and agreed to sell the suit land for sum of Rs.5,000/- after accepting the earnest money of rs.500/- and putting plaintiff in possession of the suit land. As per the terms and conditions of the said agreement further amount of Rs.1500/- was to be paid by the plaintiff by end of March 1964 and subsequent instalments were to be paid in the year 1965 and 1966. It is also an admitted fact that the plaintiff did not pay the subsequent instalments as agreed nor he filed suit for specific performance of the contract at any time. Admittedly,in the year 1964 the defendants nos,.1 and 3 had issued notice to the plaintiff and informed him that his agreement has been cancelled and he was called upon to hand over possession. Similar notice was issued to plaintiff even in the year 1966. However, no action was taken by the defendant in pursuance of the said notices and admittedly plaintiff continued in actual possession of the suit land. Accordingly the suit lands were in his possession till the year 1984, when the possession was taken from him by the Land Acquisition Officer.

11. The substantial question of law is whether

plaintiff is entitled to get compensation out of acquisition proceedings of the suit land or whether the defendants being owners of the suit land are only entitled to get entire amount of compensation. Answer to this question depends on the point as to whether the plaintiff is a "person interested" as contemplated under Section 3(b) of the said Act. In order to find out what person interested means, it would be necessary to see the relevant provisions. Section 3(b) says :

> 3. Definitions - In this Act, unless there is something repugnant in the subject or context,-
>
> a) x x
> (aa) x x
>
> (b) the expression "person interested" includes all persons claiming an interest in compensation to be made on account of the acquisition of land under this Act, and a person shall be deemed to be interested in land if he is interested in an easement affecting the land.

12. It is argued on behalf of the plaintiff that as the plaintiff is in actual possession of the suit land since the year 1963 and defendants did not take any steps to get back possession though they had in fact issued

notices regarding termination of the agreement to sell, the plaintiff has become owner by virtue of adverse possession. It is also submitted that right of defendants has in fact come to an end as they have not taken any action to secure possession within 12 years from second notice, issued in the year 1966. However, from perusal of the record it is very clear that the contention as regards to adverse possession has been given up by the plaintiff. In fact in his deposition he has clearly stated that he never sent notice or informed by any mode to the defendants that he was cultivating the suit lands by adverse possession. What is more to be noted is that admittedly plaintiff entered in the suit land under an agreement to sell. So in a way it was a permissive possession. When such is the position merely because subsequently the defendants terminated the said agreement but did not take action to secure possession it cannot be said that the plaintiff has acquired title by virtue of adverse possession. It is needless to say that even if the plaintiff’s possession is called unauthorised still then it cannot be said that he has perfected his title by virtue of adverse possession nor it can be said that right of defendants to secure possession has come to an end. So, one thing is certain that the plaintiff cannot claim any compensation on the basis that he has become owner by adverse possession.

13. Naturally, the next question for our consideration is whether merely because at the relevant time the plaintiff was in actual possession of the suit land it can be said that he is a 'person interested' as contemplated under Section 3(b) of the said Act. Shri Gavnekar, learned Advocate for the plaintiff has drawn my attention to a case Dossibai Nanabhoy Jeejeebhoy V/s P.B.Bharucha - **LX BLR 1206** wherein the Division Bench of this Court has held that right to receive compensation for compulsory acquisition of land under the Land Acquisition Act 1894 is not restricted to those persons who have a legal or proprietary interest or estate in the land and is available to all persons who have a right to claim land, even if such right or claim does not amount to legal or proprietary estate or interest in the land. This proposition is not disputed and cannot be disputed. However, the facts of the said case and the facts of the case in hand are quite different. That was a case where the first claimant was willing to grant lease and the second claimant was willing to accept the lease and the question arose as to whether the proposed lessee is entitled for compensation and what would be apportionment. However, in the instant case admittedly the plaintiff has failed to pay balance consideration amount as per the stipulation embodied in the agreement to sell. Not only that but he has failed to prove that he was ready and willing to perform his part of the contract. Admittedly, he did not file any suit for

specific performance of the agreement to sell. So. merely,because he continued in possession and defendants the original owners did not take any action against him to get back the possession it cannot be said that he has acquired a right to accept compensation as a 'person interested'.

14. As against this, Shri P.S.Dani, learned Advocate for the defendant, has placed reliance on a case of Mahammad Akil Khan V/s Premraj Jawanmal Surana and Anr. **AIR 1972 Bom 217** wherein Division Bench of this Court has made following observations.

> "a contract for sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties. It does not of itself, create any interest in or charge on such property. When the seller and buyer are both willing to perform their respective parts of the contract but the specific performance of the contract has become impossible by the unexpected interference by the State in acquiring the property, the buyer will be entitled to recover from the seller any purchase money properly paid together with interest and also earnest with interest and to that extent he would have had under

> Section 55(6)(b) of T.P. Act a charge on the land".

15. In fact relying on this authority the learned trial Court granted relief of declaration in favour of the plaintiff that he is entitled to claim earnest money with interest from the compensation amount. Of course,in the above cited ruling both the parties were willing to perform their part of contract while in the instant case it does appear that it is not so and the contract has also frustrated as a result of acquisition of land. So, having regard to the peculiar facts of the case it cannot be said that the plaintiff is a "person interested" as per Section 3(b) of the said Act or he is a person interested in the land as contemplated under Section 9 of the said Act.

16. So, when we find that the possession of the land is in fact taken by way of part performance as per the agreement to sell and subsequently the said agreement has been cancelled he was in fact not entitled to retain the possession and he should have been required to hand over the same to the defendants. Considering this aspect both the courts below have rightly held that the plaintiff is not entitled to get any share in the amount of compensation in lieu of acquisition of the suit land.

17. In my opinion, having regard to the facts and

circumstances of the case plaintiff was even not entitled to get back the earnest money also because right to receive earnest money was also lost by him as he did not file any suit for specific performance and alternatively for refund of earnest money. However, the fact remains that the trial court declared that the plaintiff is entitled to get his earnest money with interest. This finding is not challenged by the defendants, they did not file any appeal nor they filed any Cross Objections, when plaintiff filed the first appeal. So, the learned Advocate for the plaintiff has rightly submitted that the order passed by the first appellate court setting aside the declaration that was granted in favour of the plaintiff is wrong. He has placed reliance on a case Banarsi and Ors V/s Ram Phal **(2003) 9 SCC 606** wherein the Apex Court has observed that:

> "Where in a suit for specific performance of contract of sale, relief of compensation or refund of money/deposit in case of refusal of specific performance also sought by plaintiff and court while refusing the larger relief of specific performance, granted the smaller relief of compensation or refund, the plaintiff would be a person aggrieved by the decree and when appeal is filed by defendant against the grant of

> relief of compensation or refund, held, the plaintiff as a respondent can seek the relief of specific performance of contract or modification of decree only by taking cross objection or by filing appeal of his own - In absence of cross objection or cross appeal,modification of the decree and grant of relief of specific performance by the appellate court would be without jurisdiction."

18. So, the order of the first appellate court setting aside the declaration granted by the trial court has to be set aside.

19. The Appeal is partly allowed. The order passed by the 1st Appellate Court on 18-12-2003 setting aside the order declaring that the plaintiff is entitled to claim earnest money of Rs.500/- and interest of Rs.490/- from the compensation awarded by the Land Acquisition officer for the said lands is quashed and the order passed by the Court of C.J.S.D., Alibag on 27-2-1998 in Special Civil Suit No.8 of 1983 is restored.

. Under the circumstances of the case parties to bear their own costs of this appeal.

(S.R.SATHE,J.)